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No. 99-

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1999

H. KEITH HENSON,
Petitioner,

v.

RELIGIOUS TECHNOLOGY CENTER,
Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Was the decision of the Ninth Circuit Court of Appeals so violative of Petitioner's First Amendment right to freedom of speech that this Court should exercise its power of supervision to (a) review and correct the clearly erroneous fashion in which the statutory defense of fair use to copyright infringement was interpreted and applied and (b) vacate (or order vacated) on First Amendment grounds both the wrongful injunction against Petitioner and the punitive imposition on Petitioner of a large statutory damages award and a large legal fees award?

(2) In the alternative, if the Ninth Circuit correctly interpreted and applied existing precedents, does the First Amendment require that each of the four factors of the statutory fair use defense to copyright infringement instead be applied liberally in favor of an alleged infringer when the alleged infringer has engaged in political speech and social commentary with no effort at financial gain and when the alleged infringer can be threatened with a punitive award of statutory damages?

PARTIES TO THIS PROCEEDING

The names of all parties to this proceeding are contained in the caption of this case. Petitioner is an individual, not a corporate entity. *See* Supreme Court Rules 14.1(b) and 29.6.

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E. Volokh & B. McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*,
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L. Patterson, *Free Speech, Copyright, and Fair Use*,
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P. Goldstein, *Copyright and the First Amendment*,
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Constitutional Provisions

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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

H. KEITH HENSON, *Petitioner,*
v.
RELIGIOUS TECHNOLOGY CENTER, *Respondent.*

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner H. Keith Henson hereby petitions this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Pursuant to the Copyright Act, Petitioner has been found liable for copyright infringement. He has been ordered to pay $75,000 in non-compensatory penalties plus an additional $75,000 in attorneys' fees to Respondent, all for a single message posted to the Internet. In that message, Petitioner protested a TRO issued by a District Court, criticized the Church of Scientology, and included a two-page, allegedly copyrighted text to support his assertion that Scientology was engaged in criminal activity. Respondent Religious Technology Center, the purported copyright owner, is an affiliate of the Church of Scientology.

The Ninth Circuit Court of Appeals summarily affirmed the District Court's decision rejecting Petitioner's argument that this Internet posting constituted a "fair use" under Section 107 of the Copyright Act. The District Court granted summary judgment to Respondent on Petitioner's fair use argument even though the court found that Petitioner's use was noncommercial, constituted

a "criticism designed to stimulate discussion," was not intended to supplant the market for Scientology works, and would likely not result in market harm to Scientology. Petitioner respectfully submits that the judgment against him disregards his fundamental constitutional right to free speech, as well as the decisions of this Court regarding the proper application of the fair use doctrine, and respectfully requests review by this Court.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit affirming the decision of the District Court is set forth as Appendix A to this petition at pages A1-A6, and at 1999 WL 362837. The opinion of the United States District Court for the Northern District of California is set forth as Appendix B to this petition at pages A7-A23.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on June 4, 1999. This court has jurisdiction to review this petition pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Article I, § 8 of the United States Constitution provides:

> The Congress shall have Power . . . to Promote the Progress of Science and useful Arts, by securing for limited Times to

Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

Section 107 of the Copyright Act of 1976, as amended in 1992, 17 U.S.C. § 107, provides:

> § 107. Limitations on exclusive rights; Fair use
>
> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include —
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.
>
> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

STATEMENT OF THE CASE

On March 26, 1996, Petitioner, H. Keith Henson, delivered to the Honorable Ronald M. Whyte, Judge of the United States District Court for the Northern District of California, a letter he had written protesting a temporary restraining order ("TRO") that had been issued by the District Court against Grady Ward, a critic

of the Church of Scientology ("Scientology"). The TRO prohibited Mr. Ward from disseminating on the Internet certain Scientology texts.[1] Respondent Religious Technology Center ("RTC"), an affiliate of Scientology, alleges that it holds valid copyrights to those texts.

Petitioner, a computer industry professional, had become interested in early 1995 in what he regarded as Scientology's attempts to stifle criticism on the Internet. Petitioner considered Scientology's attack on its on-line critics a threat to fundamental principles of free speech. As a result, Petitioner had begun to follow the progress of lawsuits involving Scientology, including the suit against Grady Ward.

On March 29, 1996, Petitioner attended the preliminary injunction hearing in the *Ward* action, during which the District Court stated that it would issue a preliminary injunction against Grady Ward.

The next day, on March 30, 1996, Petitioner Henson posted to an Internet newsgroup[2] the open letter critical of the TRO in the *Ward* action that he had already delivered to the Court on March 26. The text of his open letter is reproduced in Appendix C.

Petitioner's letter to the District Court was both an attack on governmental power and an attack on the Church of Scientology.

With regard to governmental power, Petitioner said that he had read the TRO against Mr. Ward and considered it a potential violation of the First Amendment. Specifically, Petitioner was

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[1] Judge Whyte issued the TRO in *Religious Technology Center v. Ward,* Case No. 96-20207 RMW (the "*Ward* action").

[2] A "newsgroup" is "[A]n electronic discussion group, serving as a bulletin board for users to post universally accessible messages, and to read and reply to those from others." *Religious Technology Center v. F.A.C.T.Net., Inc.*, 901 F. Supp. 1519, 1524 n.4 (D. Colo. 1995). As this Court has noted, "There are thousands of such [news]groups, each serving to foster an exchange of information or opinion on a particular topic . . . ." *Reno v. American Civil Liberties Union,* 521 U.S. 844, 851 (1997). The newsgroup to which Petitioner posted this open letter was *alt.religion.scientology*, a discussion forum for critics of Scientology.

concerned that the language in the TRO barring all persons in "active concert" with Mr. Ward from posting might apply to "random persons on the Internet" such as himself. In that event, Petitioner wrote to the District Court that:

> [T]he TRO is a violation of my First Amendment Rights to discuss the criminal activities of the cult of Scientology.

With reference to the Church of Scientology, Petitioner posted as part of his open letter to the District Court a two-page Scientology document entitled "New Era Dianetics for Operating Thetans Series 34: The Sequence for Handling A Physical Condition" ("NOTs 34").[3] NOTs 34 provides instructions for the use of an "e-meter" to "handle" physical conditions.[4] Of NOTs 34, Petitioner said:

> Forbidding discussion of this particular document, including quoting it entirely, is clearly against the public interest as well as a violation of my First Amendment rights. Unless, of course, copyright law can be used to prevent disclosure of instructions for criminal activity.

Petitioner then argued that, in his view, NOTs 34 constituted proof that the Church of Scientology had violated

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[3] NOTs 34 is one of fifty-five works, totaling approximately 700 pages and copyrighted together as a single collection known as the "Advanced Technology" materials. Complaint, *RTC v. H. Keith Henson*, U.S.D.C. Northern Dist. Case No. C-96-20271, ¶¶ 6-11. RTC alleges it holds valid copyrights to the Advanced Technology works. *Id.* However, a district court in Colorado has recently found that there is a material issue of fact as to whether the copyrights applying to the Advanced Technology works are valid. *See Bridge Publications v. F.A.C.T.Net, Inc.*, 183 F.R.D. 254 (D. Colo. 1998). The District Court below, however, rejected Petitioner's challenge to the validity of the copyright on NOTs 34. App. B at A9-A11.

[4] The text of NOTs 34 is not included in Appendix C, but is available in the Excerpts of Record filed by Respondent in the Ninth Circuit below, which has been sealed at RTC's request. For background material on Scientology's use of an e-meter and auditing, *see generally Church of Scientology v. Richardson*, 437 F.2d 214 (9th Cir. 1971); *United States v. An Article or Device "Hubbard Electrometer,"* 333 F. Supp. 357 (D.D.C. 1971).

Court orders stemming from FDA actions against the Church in the early 1970s. Those court orders prohibited the Church from making medical claims involving the use of so-called "E-meters" as a cure for illness. S*ee United States v. An Article or Device "Hubbard Electrometer,"* 333 F. Supp. 357 (D.D.C. 1971).[5]

Petitioner quoted the entire text of NOTs 34 to prevent charges that he was unfairly quoting parts of the document out of context. *See, e.g.,* Trial Transcript 353:20-354:1. Referring to NOTs 34 in his open letter to the District Court, Petitioner said:

> I can see why the "Church" of Scientology is trying to suppress this material. If carried out, the instructions in this particular bulletin amount to *criminal* acts, to wit, the practice of medicine without a license. I produce this widely available document in its entirety for your edification.

In the final two paragraphs of his letter, Petitioner stated, in part:

> I know that taking a stand against Scientology is likely to subject me and my family to the same abuse Mr. Ward has experienced. But there comes a point where people of good will *must* stand up to criminals — even to those who are experts in using the courts to harass. . . .
>
> It is my position that public interest in this matter should override *all commercial* copyright concerns. The entire corpus of material the "Church" of Scientology is trying to keep from public view is so at odds with what cult victims are told when they are suckered into it as to constitute fraud — thinly disguised as "religion."

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[5] In *Hubbard Electrometer,* the district court noted: "Hubbard and his fellow Scientologists developed the notion of using an E-meter to aid auditing. Substantial fees were charged for the meter and for auditing sessions using the meter. They repeatedly and explicitly represented that such auditing effectuated cures of many physical and mental illnesses. . . . All this was and is false—in short, a fraud. Contrary to representations made, there is absolutely no scientific or medical basis in fact for the claimed cures attributed to E-meter auditing." 333 F. Supp. at 359.

The same day he posted this open letter to the District Court, Petitioner received an e-mail message from counsel for Respondent RTC. The e-mail message informed Petitioner that the document he had posted was a copyrighted, unpublished work to which RTC held the copyright, and demanded that Petitioner cease and desist from posting the document.

Petitioner was neither cowed nor repentant. The next day, March 31, 1996, Petitioner re-posted his open letter to Judge Whyte, including the allegedly copyrighted NOTs 34 document. Petitioner's response also asked readers of the newsgroup for any other Scientology Advanced Technology materials discussing criminal activities, and announced his intention to post the material "in the public interest."

As part of his Internet posting, Petitioner also posted his responding e-mail to counsel for RTC, which said in part:

> [I will] put it a little nicer than Grady [Ward] would, but you can take your demand, fold it till it is all corners, and stick it where "the sun don't shine."

Four days later, on April 4, 1996, the Religious Technology Center filed an action for copyright infringement and trade secret misappropriation against Petitioner. RTC simultaneously moved for a temporary restraining order and order to show cause regarding the issuance of a preliminary injunction. The matter was assigned to Judge Whyte, who granted a TRO on April 5. The preliminary injunction against Petitioner was granted on April 12, 1996. Because Petitioner could not afford legal representation, Petitioner acted as his own attorney during the TRO, preliminary injunction, and summary judgment phases of the case.[6]

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[6] While Petitioner remained *in pro per* throughout most of the District Court pre-trial action and the appeals (during the "willfulness" damages trial and motion for a new trial only, Petitioner was represented by a solo practitioner, Mr. Graham Berry), RTC was represented throughout this action by up to four law firms: Paul Hastings Janofsky & Walker in New York, Rabinowitz Boudin Standard Krinksy & Lieberman in New York, Kobrin & Moxon in Los Angeles, and the Law Offices of Thomas R. Hogan in San Jose.

Nearly a year later, on February 28, 1997, RTC filed a motion for summary judgment on its copyright claims. The District Court granted RTC's motion on April 15, 1997. In that opinion, which is reproduced in Appendix B to this Petition, the District Court rejected Petitioner's fair use defense under Section 107 of the Copyright Act, 18 U.S.C. § 107. A detailed analysis of the District Court's opinion is set forth below in Section II. As to the four factors enumerated in Section 107, the District Court held as follows:

- Although the purpose of Petitioner's posting was *noncommercial* (a point conceded by RTC) and the posting constituted a "*criticism designed to stimulate discussion*," the first factor nevertheless "*weighs in RTC's favor* since Henson's use is only minimally transformative and does not appear to be in good faith."
- Although NOTs 34 is "more informational than creative, the second factor on the nature of the copyrighted work nevertheless "*weighs heavily against Henson*" because the work was unpublished.
- Although the 700-page NOTs Series was copyrighted as a "single collection," NOTs 34 constituted a separate copyrightable element and the "amount and substantiality of the copying" factor "*weighs heavily in RTC's favor*" because Petitioner copied NOTs 34 "in its entirety."
- Although "the court is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work," this factor only "*weighs slightly* in Henson's favor."

App. B at A11-A20 (emphasis added).

Despite finding that the fourth "market harm" factor weighed slightly in Petitioner's favor, the District Court concluded that "*plaintiff's strong showing with respect to the other factors requires a finding of no fair use as a matter of law.*" App. B at A-20 (emphasis added).

Although Petitioner had repeatedly — in his open letter to the District Court, during the hearings on the TRO and

preliminary injunctions sought by RTC and in his *pro per* papers opposing RTC's motion for summary judgment — stated that he believed that the First Amendment to the United States Constitution protected his right to criticize the TRO issued in the *Ward* action and criticize Scientology, the District Court's summary judgment decision appeared to ignore Petitioner's First Amendment arguments. The First Amendment went unmentioned in the court's lengthy Memorandum order granting summary judgment to RTC.

On June 28, 1997, Petitioner, still acting as his own attorney, appealed to the Ninth Circuit the District Court's decision on summary judgment (Appeal No. 97-16160). In January 1998, the Ninth Circuit granted Petitioner's motion to file a late opening brief, and accepted for filing Petitioner's four-page *pro se* brief. Petitioner's brief lacked any citation to legal authority but, once again, put forward Petitioner's First Amendment claim.

In the meantime, the case against Petitioner proceeded to trial on the issue of the willfulness of the infringement and the amount of damages. A jury trial on these issues concluded on May 12, 1998.

The jury found that Petitioner had willfully committed copyright infringement, and awarded RTC $75,000 in so-called "statutory damages" under the Copyright Act. 17 U.S.C. § 504 (c). None of these damages is compensatory. All are, in effect, punishment. Scientology has reportedly touted this $75,000 award as the largest statutory damages award ever recorded for a single copyright infringement.[7]

The District Court entered judgment on the verdict on May 14, 1998, and awarded RTC an additional approximately $13,000

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[7] *See* WALL ST. J., July 21, 1998, reproduced at App. D, at A29.

in costs associated with the case. On September 28, 1998, the District Court awarded RTC $75,000 in attorneys' fees.[8]

As a result of his inability to pay these judgments against him, Petitioner has filed for bankruptcy protection under Chapter 13 of the federal bankruptcy laws.

In June 1998, Petitioner, once again *in pro per*, filed a second appeal in the Ninth Circuit, regarding the final judgment and award of damages against him and certain irregularities in the conduct of the trial (Appeal No. 98-16146). On October 13, 1998, Petitioner filed a sixteen-page *pro se* brief in support of this appeal, again without any citation to legal authority but again putting forward his First Amendment defense. Petitioner's second appeal was consolidated with his first appeal.

In November 1998, Heller Ehrman White & McAuliffe ("Heller Ehrman") agreed to represent Petitioner on a *pro bono* basis in his appeals to the Ninth Circuit. On December 16, 1998 Heller Ehrman brought on Petitioner's behalf a motion to file a formal brief in support of Petitioner's appeal of the grant of summary judgment on the copyright infringement claim, requesting the opportunity to properly brief the issues on appeal, with citation to controlling legal authority on the applicability of the fair use defense and Petitioner's First Amendment rights. RTC vigorously opposed Petitioner's motion to file a late formal brief. On February 16, 1999, the Ninth Circuit denied the motion.

Oral argument on the two appeals was held on March 9, 1999. On June 4, 1999, the Court of Appeals issued an unpublished Memorandum Opinion on Petitioner's appeals, reproduced herein at Appendix A. The Ninth Circuit summarily rejected Petitioner's fair use claim. The entirety of the Ninth Circuit's fair use analysis is as follows:

> Analyzing the four prongs of 17 U.S.C. § 107 (1994), the district court also properly found that Henson's copying did

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[8]RTC had requested $865,000 in attorneys' fees pursuant to 17 U.S.C. § 505. RTC has appealed the $75,000 attorneys' fees award as being too low. Appeal No. 98-17120

not constitute a fair use pursuant to the statute. Notably, Henson copied an unpublished work in its entirety, and conceded that such copying would lead to market harm.[9]

As to Petitioner's claim that his speech was protected by the First Amendment, the Ninth Circuit had only this to say:

> Henson argues that copyright law should not protect alleged criminal material because this would be a violation of the First Amendment. This argument fails in light of *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985), in which the Court stated that the laws of the Copyright Act already embrace First Amendment concerns.

REASONS FOR GRANTING THE PETITION

This is an important case. Despite the formal "non-publication" of the opinions of the Ninth Circuit and District Court below, this case will have a severe chilling effect on both political speech directed at the government and critical speech directed at institutions.

The chilling effect will not come from the formal opinions of the courts below, which will, as a *de jure* matter, continue to be hidden beneath the blanket of non-publication. The chill will emanate instead from the tremendous publicity that the case has received and will receive, both in the traditional press and on the Internet, where the case was born.[10]

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[9] The Court of Appeals' market harm statement contradicted the District Court's finding of no market harm. As explained below in Section II.D., the type of potential market harm conceded by Petitioner was that his posting "will convince the public not to buy the product because it is rubbish." App. B at A-19. However, potential market harm from "biting criticism that suppresses demand" is not actionable under the copyright laws. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 592 (1994).

[10] For example, in its lead editorial on July 21, 1998, the *Wall Street Journal* strongly criticized the judgment against Petitioner, saying, in part: "[The District Court], in short, has turned copyright law on its head. . . . The essence of the matter before [the District Court], as anyone not

The message that has been communicated to the public by press and Internet coverage of Petitioner's case is this: The Copyright Act is the Arctic wind of First Amendment Rights. In the face of that wind, it does not matter that an individual who reproduces an institution's "secret" and "unpublished" documents in order to make a political point has published only a small fraction of an entire work. It does not matter that the individual will not benefit financially from the publication. It does not matter that the institution holding the copyright will not be commercially harmed. It does not matter that copying a small fraction of the work verbatim, rather than paraphrasing it, serves to give the accompanying political comment weight and saves it from being sloughed off as exaggeration or inaccurate paraphrase. Nothing matters except the property rights of copyright owners.

Anyone who wants in the future to use even a tiny fraction of the "unpublished" documents of *any* institution to make a point will have to keep firmly in mind what has happened to Petitioner. As punishment for using just two pages of a seven-hundred-page work — all as part of pointed political and social criticism — Petitioner has so far been assessed statutory penalties averaging $37,500 per page copied, not to mention the large legal fees and costs that have been assessed against him. Respondent, meanwhile, is appealing the legal fees award as too low.

The question of whether the Copyright Act can be used in this fashion, not only to abridge Petitioner's First Amendment right to criticize the government and engage in social criticism, but to punish him, on a vague and confusing willfulness standard, for exercising those rights, has importance far beyond the particular facts and the particular parties involved in this case.

(continued from previous page)

blinded by a Pecksniffian literalness can see, is that the plaintiffs are using the law to muzzle their critics." App. D, at A31. This case is known and followed by hundreds of thousands of people. The *alt.religion.scientology* newsgroup in which many people follow this case and others involving Scientology is among the top five to ten groups in readership on the Internet. An Internet search for information regarding this case yields over 200 websites discussing this action.

I. The Petition Should Be Granted Because The First Amendment Requires That The Four Factors of the Statutory Fair Use Doctrine Be Applied Liberally In Favor Of Defendant When the Alleged Infringing Speech Has No Commercial Motive Or Impact, But Consists Purely of Political Protest and Social Commentary.

From the earliest days of the Republic, the Copyright Clause and the First Amendment have been forced to live together in the same Constitution. Observers of that Constitution, like friends of a troubled marriage, have often remarked that this co-habitation might well lead to conflict and crisis. *See, e.g.*, 1 *Nimmer on Copyright* § 1.10[A] at 1-66.43 (1998). [11]

The Copyright Clause, after all, however dressed up it may now be in the finery of "promoting the progress of science and useful arts," was born of governmental censorship. The First Amendment was born of what we have come to regard as a better lineage – the desire of the People for robust freedom of speech, particularly as regards political and social commentary.[12]

To the surprise of many, this potential conflict has been kept at bay. Instead, the crisis-that-might-have-been has been largely avoided by inventive legislation and thoughtful judging. Indeed, in the mid 1980s, this Court appeared to provide some resolution by remarking, in dicta, that First Amendment protections are "already embodied" in the Copyright Act's distinction between copyrightable expression and uncopyrightable facts and in the "latitude for scholarship and comment

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[11] Professor Nimmer has termed the relation between copyright law and the first amendment a "paradox." For additional articles exploring the tension between free speech and copyright, *see, e.g.*, S. Fraser, *The Conflict Between The First Amendment And Copyright Law And Its Impact On The Internet*, 16 CARDOZO ARTS & ENT. L.J. 1 (1998); L. Patterson, *Free Speech, Copyright, and Fair Use*, 40 VAND. L. REV. 1 (1999); P. Goldstein, *Copyright and the First Amendment*, 70 COLUM. L. REV. 983 (1970).

[12] *See* Fraser, *supra* note 11, at 19-20 and n.126 (describing history of adoption of Copyright Clause and First Amendment).

traditionally afforded by fair use." *Harper & Row Publishers v. Nation Enter.*, 471 U.S. 539, 560 (1984).

These dicta have been widely interpreted by lower courts to mean that the fair use analysis, by itself, contains a set of automata that will resolve First Amendment concerns without the need to look with care at the demands of the First Amendment itself. *See, e.g., New Era Publications, ApS v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989) ("The fair use doctrine encompasses all claims of first amendment in the copyright field."); *Nihon Keizai Simbun, Inc. v. Comline Business Data, Inc.*, 166 F.3d 65, 74 (2d Cir. 1999) ("We have repeatedly rejected First Amendment challenges to injunctions from copyright infringement on the ground that First Amendment concerns are protected by and coextensive with the fair use doctrine.").

For cases that involve competing copyright and First Amendment claims by commercial competitors, the "automatic" features of the *Harper & Row* approach may well do the trick. *Harper & Row*, after all, was just such a case.

There, *The Nation* dressed up its fair use claim regarding publication of excerpts from President Ford's unpublished memoirs in the language of freedom of speech and the public interest. But this Court recognized the situation for what it really was: "the piracy of verbatim quotations" for the purpose of achieving a "scoop." *Harper & Row*, 471 U.S. at 559. There is no doubt that such a scoop generated major commercial advantages for *The Nation* and a major loss for the owners of the copyright, who were usurped of their "commercially valuable right of first publication." Hence, *Harper & Row* was very much a case about commerce and competitors. *Id.* at 562.

Petitioner's case is quite different. The District Court identified no money-making motive of any kind by Petitioner. Nor did it find convincing evidence of commercial harm to the copyright owner. In the normal course, one would imagine that this set of findings would remove the case from the purview of the Copyright Act and place it squarely within those First Amendment precedents that encourage political speech (aimed in

this case at the District Court) and social commentary (aimed at the Church of Scientology).

In the arena of political speech, this Court has many times made clear that the First Amendment protects all manner of speech.[13] Indeed, this Court has said, perhaps anticipating Petitioner's comments:

> [I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions.

New York Times Co. v. Sullivan, 376 U.S. 257, 269 (1963).

Or, as Judge Leval of the Southern District of New York put it:

> First Amendment protections do not apply only to those who speak clearly, whose jokes are funny, and whose parodies succeed.[14]

What has been taken away from Petitioner here, then, is his right to speak his mind, both about the orders of the District Court and the alleged actions of the Church of Scientology. Were this a case of commercial competitors, where one had gained financially and the other had lost, perhaps the restriction on Petitioner's speech would be at least open to debate. But this is not such a case.

Rather, this is a case in which Petitioner was engaged in clearly protected political speech and social commentary, using

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[13] *See, e.g., Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1034-36 (1991) (striking down as unconstitutional a rule against extrajudicial statements of lawyers, on ground that "political speech critical of the government and its officials" is protected by the First Amendment); *see also Reno v. ACLU*, 521 U.S. 844 (1997) (protecting indecent speech on the Internet; highest level of First Amendment protection accorded Internet speech); *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (holding unconstitutional an ordinance prohibiting bias-motivated expression).

[14] *Yankee Publishing, Inc. v. News Am. Publishing, Inc.*, 809 F. Supp. 267, 280 (S.D.N.Y. 1992).

two pages of a seven-hundred page work to make a point and to challenge a judge. Surely, this situation deserved at least a careful articulation and balancing of the First Amendment and Copyright Act principles that are at issue.[15]

Indeed, this Court has said that the challenge of copyright law is to strike the "difficult balance between the interests of authors and inventors in the control and exploitation of their writings and discoveries on the one hand, and society's competing interest in the free flow of ideas, information, and commerce on the other hand." *Harper & Row*, 471 U.S. at 580, quoting *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 429 (1984). Despite that admonition, the District Court seems to have addressed the First Amendment issues not at all, while the Court of Appeals has done so in only the most cursory fashion. Certainly neither court gave much weight in the balance to the information that Petitioner was trying to convey.

It is unclear whether this situation is the result of Petitioner's inartfulness in putting forth his First Amendment Claims or the result of the courts below being lulled into inaction by the seemingly easy-to-apply *dicta* in Harper & Row concerning the relationship between fair use and the First Amendment.[16] Whatever the explanation, Petitioner's First Amendment rights have been violated, through both prohibition and severe punishment.

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[15] *See* Chief Judge Lumbard's concurring opinion in *Rosemont Enters., Inc. v. Random House, Inc.*, 366 F.2d 303, 311 (2d Cir. 1966), *cert. denied*, 385 1009 (1967):

> The spirit of the First Amendment applies to the copyright laws at least to the extent that the courts should not tolerate an attempted interference with the public's right to be informed regarding matters of general interest when anyone seeks to use the copyright statute which was designed to protect interests of quite a different nature.

[16] *See* Fraser, *supra* note 11, at 20 ("[M]aintaining the First Amendment privilege within the fair use doctrine leaves the impression that the interests found in the Bill of Rights can be balanced away every time the price to copyholders is too high.").

Petitioner respectfully requests this Court to correct these errors by granting the Writ, reviewing the case and either:

(1) Holding that, on the merits, the Court of Appeals, which adopted wholesale the analysis of the District Court, simply erred as a matter of law in its application of the statutory factors to be considered under the fair use defense to copyright infringement. If this finding were to be made by this Court, Petitioner would prevail and his First Amendment rights would be vindicated, but the First Amendment constitutional issue otherwise raised would be avoided; or

(2) Holding that, while First Amendment rights in this context do not automatically trump a copyright claim, the First Amendment requires that the four factors of the statutory fair use defense to infringement be applied liberally in favor of an alleged infringer when the alleged infringer has engaged in political speech and social commentary with no effort at financial gain. Under that standard, Petitioner's fair use defense would clearly prevail since, as pointed out below, the Court of Appeals, following the lead of the District Court, in fact tilted the analysis of each factor *against* Petitioner despite the fact that he engaged in clear political speech and social commentary with no commercial gain, and there was no evidence of actionable market harm to Respondent.

II. The Petition Should Be Granted Because The Fair Use Analysis Applied By The Courts Below Failed To Follow The Decisions Of This Court

As this Court has repeatedly noted, the fair use doctrine is an "equitable rule of reason" that "permits courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *Stewart v. Abend*, 495 U.S. 207, 236 (1990); *Harper & Row*, 471 U.S. at 550 n.3; *Sony*, 464 U.S. at 448. The fair use doctrine has

been termed "a critical safety valve of copyright. Flexibility and sensitivity are essential to its successful functioning." [17]

The four factors enumerated in Section 107 are not exclusive, and the application of the fair use doctrine must be evaluated on a case-by-case basis, according to the facts of each case. *Harper & Row*, 471 U.S. at 560; *Campbell*, 510 U.S. at 577-78 ("The task is not to be simplified with bright-line rules, for the statute, like the doctrine it recognizes, calls for case-by-case analysis."). Unfortunately, the enumeration of the four factors of the fair use analysis in Section 107 has resulted in "mechanistic, formulaic decisions"[18] — of which the decisions of the courts below are prime examples.

The Ninth Circuit here adopted wholesale the District Court's flawed analysis, finding that Henson's copying and criticism of NOTs 34 did not constitute a fair use. By its failure to exercise independent review,[19] the Ninth Circuit has sanctioned a departure by the District Court so far removed from the accepted and usual course of judicial proceedings as to call for review by this Court.

A. Petitioner's Use Was Of A Critical, Noncommercial Nature And Was Transformative Under This Court's Decision In Campbell

Section 107 provides that the first factor a court must look at in the fair use analysis is "the purpose and character of the use,

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[17] W. Patry & S. Perlmutter, *Fair Use Misconstrued: Profit, Presumptions, and Parody*, 668 CARDOZO ARTS & ENT. L.J. 667, 668 (1993) ("Patry & Perlmutter").

[18] Patry & Perlmutter at 670.

[19] *See Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 499 (1984) ("[I]n cases raising First Amendment issues we have repeatedly held that an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not constitute a forbidden intrusion on the field of free expression.'"); E. Volokh & B. McDonnell, *Freedom of Speech and Independent Judgment Review in Copyright Cases*, 107 YALE L.J. 2431 (1998).

including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. §107(1) (emphasis added) The Ninth Circuit *did not even address* this critical first factor in adopting the District Court's judgment. App. A at A-3.

The District Court, in analyzing the "purpose and character" of Petitioner's use, gave short shrift to the fact that Petitioner's use was noncommercial in nature. Although the District Court noted that RTC had conceded that Petitioner's use was *noncommercial* (App. B at A14), the court gave little weight to Petitioner's stated purposes in posting his open letter — criticism of Scientology and the court's TRO in the *Ward* action and concern to protect the public from fraud and quackery. Instead, the court remarked that "[t]he limited commentary in Henson's posting does not reveal that Henson's purpose was to educate the public about the alleged criminal content of NOTs Series 34." App. B at A15. The court noted only in passing that Petitioner's letter "discusses the temporary restraining order issued in a related case." *Id.*

The District Court concluded that "[t]he posting may be viewed, at best, as *a criticism designed to stimulate discussion*." *Id.* at A15 (emphasis added). Nevertheless, the District Court concluded that the "purpose and use" factor "*weighs in RTC's favor* since Henson's use is *only minimally transformative* and does not appear to be in good faith."[20] *Id.* at A16 (emphasis

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[20]The District Court determined that Petitioner's use "does not appear to be in good faith" because "Henson does not attempt to argue that the copying was unintentional or inadvertent." App. B at A15. However, this completely misapprehends the significance of good faith in the fair use analysis. As Justice Story noted, bad faith exists when a defendant "cites the most important parts of the work, not to criticize, but to supersede the use of the original work." *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4,901). Such use "will be deemed in law a piracy." *Id; see Wainwright Sec., Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 96-97 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978) ("This was not legitimate coverage of a news event; instead it was . . . chiseling for personal profit.").

Here, there is no evidence that Petitioner quoted NOTs 34 for personal profit or financial gain. Copyright law allows the intentional

added). The District Court's analysis of the "purpose and character of use" factor, as adopted by the Ninth Circuit, is contrary to law and cannot stand.

First, Section 107 itself clearly provides that "the fair use of a copyrighted work, including such use by reproduction . . . for purposes such as criticism, comment [or] news reporting . . . is not an infringement of copyright." 17 U.S.C. §107. The very fact the District Court found Petitioner's use to be "a criticism designed to stimulate discussion" establishes that Petitioner's use falls "'comfortably within' [the] statutory categories 'of uses illustrative of uses that can be fair.'" *New Era Publications, Int'l ApS v. Carol Publishing Group*, 904 F.2d 152, 156 (2d Cir.), *cert. denied*, 498 U.S. 921 (1990); *see Campbell*, 510 U.S. at 578 ("The enquiry [into the purpose and character of the use] may be guided by the examples given in the preamble to § 107, looking to whether the use is for criticism, or comment, or news reporting, and the like. . . .").[21]

Second, the District Court erred in failing to give adequate weight to the *noncommercial purpose* of Petitioner's use. *See Harper & Row*, 471 U.S. at 562 ("The fact that a publication was commercial as opposed to nonprofit is a separate factor that tends to weigh against a finding of fair use."); *Sony*, 464 U.S. at 451

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copying or quoting of works for purposes of criticism — this is the essence of fair use. The District Court was unmoved by the genuineness of Petitioner's public interest motive; instead, it appears to have been motivated in its summary judgment determination by the unrepentant, in-your-face nature of Petitioner's advocacy. Indeed, RTC devoted substantial portions of its briefs to the District Court and Ninth Circuit to describing Petitioner's allegedly "arrogant" conduct. *See, e.g.*, RTC's Brief in Appeal No. 97-16160, at 6-19, 41-42. This, Petitioner submits, is not a valid basis for the extreme penalty he has incurred. "Zealots have First Amendment rights too." *Pinette v. Capitol Square Review & Advisory Board*, 30 F.3d 675, 680 (1994), *aff'd*, 515 U.S. 753 (1995).

[21] *See also New Era Publications, Int'l ApS v. Henry Holt Co.*, 884 F.2d 659, 661 (2d Cir. 1990) ("If a [work] falls into one of these categories [criticism, comment, news reporting, etc.], assessment of the first fair use factor should be at an end.") (Miner, J., concurring in the denial of rehearing en banc).

("[A]lthough every commercial use of the copyrighted material is presumptively an unfair exploitation of the monopoly privilege that belongs to the owner of the copyright, noncommercial uses are a different matter."). In the instant case, there was absolutely no use of NOTs 34 for commercial purposes or financial gain, *and RTC conceded as much.* App. B at A14. Accordingly, the District Court should have determined that the noncommercial nature of Petitioner's use supported a finding of fair use. *See Sony,* 464 U.S. at 450-51.

Third, the District Court erred in finding Petitioner's use "only minimally transformative." App. B at A15-16. As this Court unanimously held in *Campbell,* "[t]he central purpose of [the purpose and character use] investigation is to see . . . whether the new work merely 'supersede[s] the objects' of the original creation . . . or instead adds something new, with a further purpose or different character, altering the first with new expression meaning and message." 510 U.S. at 579. The analysis thus focuses on "whether and to what extent the new work is 'transformative.'" *Id.,* citing P. Leval, *Toward a Fair Use Standard,* 103 HARV. L.R. 1105, 1111 (1990) ("Leval").

Despite finding that Henson's open letter to Judge Whyte was properly characterized as "criticism," the District Court concluded that Petitioner's use was "only minimally transformative" because Petitioner quoted NOTs 34 verbatim and "add[ed] little new expression to the work." App. B at A15. In so doing, the District Court completely misapprehended what this Court meant by "transformative." *See Campbell,* 510 U.S. at 579, citing Leval at 1111.[22]

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[22]A work is transformative if it "employ[s] the quoted matter in a different manner or for a different purpose from the original," and if it uses the original work "as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings — this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society." Leval at 1111 (noting that "[T]ransformative uses may include criticizing the quoted work, exposing the character of the original author, [or] proving a fact."); *see also Castle Rock Entertainment, Inc. v. Carol Publishing Group., Inc.*, 150 F.3d 132, 143

Here, it is beyond dispute that Henson's open letter to the District Court "adds something new, with a further purpose and different character," altering NOTs 34 with "new expression, meaning, or message." *Id.* Petitioner embedded NOTs 34 in a letter openly protesting the injunction issued by the District Court in the *Ward* action and added information about court orders expressly forbidding Scientology to claim that use of e-meters can heal. He did so to support his assertion that Scientology was engaged in illegal conduct. Petitioner's open letter thus *transforms* NOTs 34 from a set of directions for purportedly "handling physical conditions" into evidentiary support for a scathing attack on Scientology for allegedly practicing medicine without a license, defrauding its converts, and using the courts to harass and intimidate critics.

Petitioner was not using NOTs 34 to teach people how to "handle physical conditions," thereby "'supersed[ing] the objects' of the original creation" or "supplant[ing] [the original] work in the marketplace with his own." *Maxtone-Graham v. Burtchaell*, 803 F.2d 1253, 1260 (2d Cir. 1986). Rather, Petitioner's aim was to attack Scientology and to criticize the District Court for restraining the speech of persons critical of Scientology.[23] Accordingly, the District Court's finding that Petitioner's use is "only minimally transformative," and that the first factor "*weighs in RTC's favor*" cannot, as a matter of law, be upheld. If the District Court had taken Petitioner's First Amendment rights into account in applying the fair use doctrine, this "purpose and use" factor should have been weighed in favor of Petitioner.

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(2d Cir. 1998) ("[A] secondary work need not necessarily transform the original work's expression to have a transformative purpose.").

[23]The location of Petitioner's posting is also highly probative of the "further nature" and "different character" of the use. Petitioner posted his open letter to Judge Whyte at the *alt.religion.scientology* newsgroup — an "online form for discussion and criticism of scientology." *RTC v. Netcom On-Line Communications*, 907 F. Supp. 1361, 1365 (N.D. Cal. 1995). Because *alt.religion.scientology* is highly critical of Scientology no one could mistake the purpose and character of Petitioner's letter.

B. The Lower Courts Erroneously Held That The "Unpublished" Nature Of The Work Prevented A Finding Of Fair Use

The second factor a court must examine is "the nature of the copyrighted work." 17 U.S.C. §107(2). "This factor calls for recognition that some works are closer to the core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." *Campbell*, 510 U.S. at 586.

Here, the Ninth Circuit and the District Court erred in adopting a virtual *per se* rule against fair use of unpublished works. In his opinion, the District Court noted that "[t]he scope of fair use is narrower with respect to unpublished works . . . and the amount of permissible copying will be less in the case of an unpublished work" and noted that "[h]ere, the work at issue is unpublished." App. B at A16. The Ninth Circuit relied upon the fact that NOTs 34 is an allegedly unpublished work in finding that the District Court had correctly ruled against Petitioner. App. A at A-3 & n.3 (citing *Harper & Row* for the proposition that "[t]he fact that a work is unpublished is a consideration which cuts against the infringing defendant").

However, the notion that "the scope of fair use is narrower with respect to unpublished works" is an incorrect statement of the law. In 1992, Congress responded to *Harper & Row*, as well as to certain Second Circuit decisions that seemed to lean toward a *per se* rule against fair use for unpublished works,[24] by amending Section 107 of the Copyright Act to add the following provision:

> The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above [fair use] factors.

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[24] *Salinger v. Random House, Inc.*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *New Era Publications, Int'l ApS v. Henry Holt & Co.*, 873 F.2d 576 (2d Cir.), *cert. denied*, 493 U.S. 1094 (1990).

("1992 Amendment"); *see Copyright: Fair Use of Unpublished Works*, H.R. REP. NO. 102-386, 102nd Cong., 2d Sess. (Aug. 11, 1992), *reprinted in* 1992 U.S.C.C.A.N. 2553 (House Report").

The 1992 Amendment makes clear Congress's intention that, "in evaluating a claim of fair use, including claims involving unpublished works, the courts are to examine all four statutory factors set forth in Section 107, as well as any other factors deemed relevant in the court's discretion." House Report at 2561. Therefore, unpublished works are to be treated the same as published works, with a full analysis of the four-factor test and other relevant factors to determine whether a fair use exists. *See, Wright v. Warner Books, Inc.*, 953 F.2d 731, 740 (2d Cir. 1991) ("Neither *Salinger, Harper & Row*, nor any other case . . . erected a *per se* rule regarding unpublished works. The fair use test remains a totality inquiry, tailored to the particular facts of each case."); *Norse v. Henry Holt & Co.*, 847 F. Supp. 142, 146 (N.D. Cal. 1994) ("In 17 U.S.C. § 107 Congress explicitly provided that the fair use defense may apply to unpublished work . . . .").[25]

In addition, the District Court erred in its analysis of the second factor in ignoring the impact of whether the work is factual or creative. In general, fair use is more likely to be found in factual works than in fictional works. *Stewart*, 495 U.S. at 237-

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[25] *See also Religious Technology Center v. Lerma*, 897 F. Supp. 260, 264 (E.D. Va. 1995) (in action for infringement based on dissemination of Scientology works on Internet, unpublished nature of works "plays a minimal role in this court's consideration"). In this case, it cannot be said that the work at issue is "unpublished" in the sense understood in *Harper & Row*, where the defendant had usurped plaintiff's right of first publication. 471 U.S. at 564. Here, Scientology has already "published" the subject text to thousands of persons who have paid the proper fee and worked their way through the requisite levels of Scientology training. RTC is thus not attempting to enforce its right of first publication, but is simply seeking to prevent persons who have not paid the requisite fee from seeing and criticizing its works. Treating NOTs 34 as "unpublished" under such factual circumstances is not justified. *See, e.g., Copyright Law Revision — Part 2*, 88th Cong., 1st Sess. 27 (1963) (suggesting that works disseminated to the public in a form not constituting a technical "publication" should nevertheless be subject to fair use), cited in *Harper & Row*, 471 U.S. at 551.

38; *see, e.g., RTC v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995) (Advanced Technology documents "intended to be informational rather than creative and, therefore . . . a broader fair use approach is appropriate."). The District Court considered this issue and concluded that NOTs 34 was more informational than creative. App. B at A16-A17. The District Court, however, then immediately discounted its own conclusion by noting that the Court "remains unconvinced that this factor should play a major role in the context of religious works, which do not easily fit into the creative/informational dichotomy." *Id.* Because the District Court considered only the unpublished nature of NOTs 34, and not its informational nature, it held that the second factor weighed "heavily" against Petitioner. *Id.*

There is, however, no precedent for ignoring a required step in the fair use analysis merely because the work copied is religious. Ignoring the creative/informational dichotomy transforms the second fair use factor into the simple, yet incomplete inquiry: Is the copyrighted work published or unpublished? More importantly, the District Court's analysis reduces the second fair use factor to a *per se* rule favoring the plaintiff in every copyright infringement action where the defendant makes use of unpublished material. In addition, it improperly provides unpublished religious works with more copyright protection than unpublished secular works.

Again, if the lower courts were required to apply the fair use defense liberally in favor of noncommercial, political speech, this factor should have been applied in favor of Petitioner.

C. The Lower Courts Mechanically Focused On The Extent Of The Copying As Preventing A Finding Of Fair Use

The third factor a court must evaluate in the fair use analysis is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. §107(3).

The District Court rejected Petitioner's argument that he copied only 1.4% of the collective work registered with the

Copyright Office, which is the 55 works of the NOTs series, registered under the name of "Advanced Technology." App. B at A18. Instead, the District Court adopted RTC's argument that each work in the NOTs series is a "separate, discrete and finite" work, and that Henson, by copying NOTs 34 in its entirety, had copied the entire work. *Id.* This holding is erroneous because there is no showing that each work in the NOTs series is "separately authored and constitutes a discrete original work[] of authorship." *American Geophysical Union v. Texaco*, 60 F.3d 913, 926 (2d Cir. 1994). In addition, *it contradicts* the District Court's "market harm" finding later in its opinion, in which the court states that it "is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work" because "NOTs Series 34 *is just one work in the collective NOTs Series*. . . . Thus, the value to a potential competitor or parishioner possessing NOTs Series 34 alone is not great." App. B at A19.

But even assuming that the two-page NOTs 34 could be classified as a separately copyrighted work, both lower courts erred in analyzing the third factor. The District Court noted that "copying an entire work ordinarily militates against a finding of fair use," and "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." App. B at A17. The Ninth Circuit perfunctorily concluded that Henson's copying did not constitute a fair use because "Henson copied . . .[NOTs 34] in its entirety," and noted "[i]t is generally not a fair use if the entire work is reproduced." App. A at A3 & n.4.

This mechanical application of the third factor is erroneous. As this Court has noted, the task of analyzing application of the fair use defense "is not to be simplified with bright-line rules." *Campbell*, 510 U.S. at 577-78. With respect to the third factor, courts must determine "whether 'the quantity and value of the materials used' . . . are reasonable in relation to the purpose of the copying." *Id.* at 586. The "extent of permissible copying varies with the purpose and character of the use." *Id.; see also Maxtone-Graham*, 803 F.2d at 1263 ("There are no absolute rules as to how much of a copyrighted work may be copied and still be considered a fair use.").

Indeed, courts have held that the copying of an original work in its entirety may constitute fair use. *See, e.g., Sony*, 464 U.S. at 456 (recording an entire television program for the purpose of watching it at a more convenient time ("time-shifting") constituted a fair use since the plaintiff failed to show that this practice would likely cause more than minimal harm to the potential market for their copyrighted works); *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1153-56 (9th Cir. 1986) (copying of an entire parody of a liquor advertisement constituted fair use because the defendant "did not use more than was reasonably necessary . . .to defend himself against . . . derogatory personal attacks").[26]

In the instant case, the Ninth Circuit and the District Court failed to consider fully the nature and purpose of the open letter to the District Court: to bring to the public's attention what Henson believed to be government conduct that violated his First Amendment right to free speech. Given the obscurity of NOTs 34, its brevity, and Petitioner's fears that he would be accused of taking the document out of context if he quoted any less, Petitioner believed that he could not post any less than he did and persuasively convey his message that the District Court's TRO prevented Henson and others from notifying the public of what he believed to be the Church of Scientology's dangerous and criminal conduct.

Perhaps if Petitioner had been more legally sophisticated, he could have "fair-usified" NOTs 34 in his posting by omitting some portion. Then, perhaps, the District Court might have found in his favor on this third factor. But Petitioner's liability for copyright infringement should not depend on whether he quoted 10%, 50%, or 100% of NOTs 34. The outcome of the fair use analysis should not depend on such mechanistic application of the factors. *See Sony*, 464 U.S. at 449 n.31 (Congress "eschewed a rigid, bright-line approach to fair use."). Instead, the judgment

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[26] *See also Harper & Row*, 471 U.S. at 564 ("[E]ven substantial quotations might qualify as fair use in a review of a published work or a news account of a speech").

should center on a sensitive analysis of the context in which the work was quoted, and the purpose for such quotation — an analysis which clearly requires a finding of fair use.

D. No "Market Harm" Exists Where Petitioner's Use Was Non-Commercial And Not Intended To Supplant The Market For Scientology's Works

The final factor a court must examine is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. §107 (4). This factor "requires courts to consider not only the extent of market harm caused by the particular actions of the alleged infringer, but also whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market for the original." *Campbell*, 510 U.S. at 590. This "market harm" factor has been deemed "the single most important element of fair use." *Harper & Row*, 471 U.S. at 566; *see also Stewart*, 495 U.S. at 238 ("The fourth factor is the 'most important, and indeed, central fair use factor.").

Analysis of this factor distinguishes between market harm caused by criticism of the work — which is not actionable under the copyright laws — from actionable market harm caused when the allegedly infringing use "supplants the original in markets the original is aimed at." *Fisher v. Dees*, 794 F.2d 432, 437 (9th Cir. 1986) ("Copyright law is not designed to stifle critics."). As this Court stated in *Campbell*, "the role of the courts is to distinguish between '[b]iting criticism [that merely] suppresses demand [and] copyright infringement[, which] usurps it." 510 U.S. at 591-93; *see also New Era*, 904 F.2d at 160 ("Harm to the market for a copyrighted work or its derivatives caused by a "devastating critique" that "diminished sales by convincing the public that the original work was of poor quality" is not within the scope of copyright protection.") (holding that market harm to authorized

biography of L. Ron Hubbard caused by quotations and criticism in defendant's unauthorized biography is not actionable).[27]

Here, there was absolutely no showing that Petitioner's limited use would supplant the market for Scientology's works, and the District Court so held. The District Court correctly found that Petitioner's open letter quoting NOTs 34 would not damage RTC's ability to collect money for showing NOTs 34 to Scientologists. App. B at A19. Nevertheless, the District Court concluded that the lack of market harm weighed only "slightly" in Petitioner's favor and was outweighed by "plaintiff's strong showing with respect to the other factors," which "requires a finding of no fair use as a matter of law." *Id.* at A20.

This finding is in conflict with this Court's decisions that the lack of market harm almost *compels* a finding of fair use. As this Court has noted:

> [A] use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work, need not be prohibited in order to protect the author's incentive to create. The prohibition of such noncommercial uses would merely inhibit access to ideas without any countervailing benefit.

Sony, 464 U.S. at 450-51; *see also New Era*, 904 F.2d at 160 ("'Where the copy does not compete in any way with the original,' copyright's central concern—'that creation will be discouraged if demand can be undercut by copiers'— is absent.").

Accordingly, the District Court erred in finding that the fourth factor only "slightly" favored Petitioner; instead, the lack of market harm *decisively* favors a finding of fair use.

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[27] *See also RTC v. Lerma*, 908 F. Supp. at 1358: "Regarding the RTC's concern about potential loss of new parishioners, this is the price paid in a free society which encourages an open marketplace for ideas. Free speech protections and the fair use exemption . . . exist to permit open and educated debate on matters of public importance. . . . Harm from legitimate criticism is not actionable under either the First Amendment or the copyright laws."

Surprisingly, the Ninth Circuit contradicted the District Court's finding of no market harm by concluding that Henson's copying did not constitute fair use because Petitioner had "conceded that such copying would lead to market harm." App. A at A-3. What Petitioner admitted, however, was only that his conduct "might convince the public not to buy the product because it is rubbish," "*not* because people will take the material from the Internet and use it." App. B at A19. This is precisely the type of market harm resulting from "biting criticism that suppresses demand" that this Court has held is *not* actionable. *Campbell,* 510 U.S. at 592. Although the Ninth Circuit characterized the "market harm factor as "the single most important element of fair use," App. A at A3, it completely misapprehended it.

If, as Petitioner alternatively proposes, a rule were established instructing courts to liberally apply the fair use factors to support First Amendment interests in cases involving noncommercial, political speech, this factor, too, would require a finding of fair use.

CONCLUSION

The unprecedented judgment below of $75,000 for a single alleged act of copyright infringement, for speech that was noncommercial, not intended to supplant the market for the subject works, and purely for the purpose of protest and criticism, conflicts with fundamental First Amendment guarantees as defined by this Court. Accordingly, Petitioner respectfully requests that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

No. 97-16160; 98-16146

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

RELIGIOUS TECHNOLOGY CENTER,
a California non-profit corporation
Plaintiff-Appellee,

v.

H. KEITH HENSON,
Defendant-Appellant

DC No. CV-96-20271-RMW/EAI

MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Ronald M. Whyte, District Judge, Presiding

Argued and Submitted March 9, 1999
San Francisco, California

Filed June 4, 1999

Before: Herbert Y. C. Choy and A. Wallace Tashima, Circuit Judges, and Jane A. Restani, Judge of the United States Court of International Trade, sitting by designation

In this copyright infringement action, Defendant-Appellant Keith Henson ("Henson") appeals the district court's partial grant of summary judgment for Plaintiff-Appellee, Religious Technology Center ("RTC"),[1] which includes the entry of a permanent injunction issued on June 16, 1997. (Appeal No. 97-16160). Henson also appeals the judgment entered after a jury trial awarding RTC $75,000 in statutory damages for Henson's willful infringement of RTC's copyright. (Appeal No. 98-16146). These two challenges to the district court's judgment have been consolidated on appeal.

We have jurisdiction pursuant to 28 U.S.C. § 1291 (1994). We review the grant of summary judgment *de novo*. *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 551, 516 (9th Cir. 1993). We affirm the decision of the district court.

I. Grant of partial summary judgment for RTC

The district court granted RTC's motion for summary judgment on the grounds that Henson had infringed RTC's copyright of the work entitled "NOTs 34"[2] by displaying the work over the internet, and that Henson had no valid defense because Henson's copying of NOTs 34 was not a fair use. Henson argues that copyright law should not protect alleged criminal material because this would be a violation of the First Amendment. This argument fails in light of *Harper & Row, Publishers, Inc. v. Nation Enter.*, 471 U.S. 539 (1985), in which the Court stated that

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[1] RTC is a California non-profit religious corporation which holds an exclusive license in copyrighted materials of the Church of Scientology, known as the "Advanced Technology".

[2] The Advanced Technology materials include a body of unpublished works called the "New Era Dianetics for Operating Thetans", or "NOTs." NOTs 34 is one of the 55 NOTs issues registered with the U.S. Copyright Office.

the laws of the Copyright Act already embrace First Amendment concerns. *Id.* at 560.

The district court properly found that RTC owned a valid copyright and that Henson had copied NOTs 34, the two elements which must be proven in order to establish copyright infringement. *See Feist Publications, Inc. v. Rural Telephone Service Co.*, 449 U.S. 340, 361 (1991).

Analyzing the four prongs of 17 U.S.C. § 107 (1994), the district court also properly found that Henson's copying did not constitute a fair use pursuant to the statute. Notably, Henson copied an unpublished work[3] in its entirety,[4] and conceded that such copying would lead to market harm.[5]

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[3] The fact that a work is unpublished is a consideration which cuts against the infringing defendant. *See Harper & Row*, 471 U.S. at 564 ("The fact that a work is unpublished is a critical element of its 'nature'."); *but see Religious Technology Center v. Lerma*, 897 F. Supp. 260, 264 (E.D. Va. 1995) (noting that amendment to Section 107 after *Harper & Row* "make[s] clear that [t]he fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.") (citing 17 U.S.C.A. § 107 (West Supp. 1995)).

[4] It is generally not a fair use if the entire work is reproduced. *See* 4 Nimmer on Copyright § 13.05[A][3] at 13-185 (1998); *see also Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) ("ordinary effect" of copying a document in its entirety "militat[es] against a finding of fair use.").

[5] Market harm has been characterized as the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, although the Court later stated that in fair use analysis all the statutory factors "are to be explored, and the results weighed together, in light of the purposes of copyright," *Campbell v. Acuff Rose Music, Inc.*, 510 U.S. 569, 578 (1994).

We therefore affirm the district court's grant of partial summary judgment and the permanent injunction.

II. Issues arising from the course of trial

Henson raises several issues on appeal regarding the jury verdict and issues that arose during the trial, but Henson failed to amend his notice of appeal to include an appeal of the denial of his motion for a new trial.

Pursuant to Rule 4(a)(4)[6] of the 1998 Federal Rules of Appellate Procedure, Henson's appeal was premature because it was filed prior to the denial of his motion of a new trial. The appeal of the judgment became timely when the district court entered its denial of Henson's motion for a new trial. Because Henson failed to amend his notice of appeal to include the denial of his motion for a new trial, he has not properly appealed that motion. Therefore we will only review those issues which Henson could appeal directly from the judgment. We will not review the two claims Henson has raised which require a

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[6] Rule 4(a)(4) provides in relevant part:

> A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions [including a motion for a new trial] is ineffective to appeal from the judgment or order . . . specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Appellate review of an order disposing of any of the above motions requires the party . . . to amend a previously filed notice of appeal.

The wording differs slights in the 1999 version of the rule, but it is to the same effect. *See* Fed. R. App. P. 4(a)(4)(B) (1999).

postjudgment motion prior to appeal: (1) the sufficiency of the evidence[7] and (2) the excessiveness of the judgment.[8]

Henson may properly appeal the judge's evidentiary rulings directly from the judgment. *See Evanow v. M/V Neptune*, 163 F.3d 1108, 1116-17 (9th Cir. 1998) (reviewing disputed evidentiary rulings directly from judgment without stating that any motions were required in order for court to conduct such review). A new trial based on an incorrect evidentiary ruling, however, is "only warranted ... if the ruling substantially prejudiced a party." *United States v. 99.66 Acres of Land*, 970 F.2d 651, 658 (9th Cir. 1992). The trial judge, however, has "wide latitude in the admission or exclusion of evidence where the question is one of materiality or relevancy." *Lies v. Farrell Lines, Inc.*, 641 F.2d 765, 773 (9th Cir. 1981) ("and a decision to exclude evidence will not be disturbed unless there was been an abuse of discretion."). Henson has failed to show such an abuse of discretion by the district court in its evidentiary rulings.

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[7] In order to rule on whether the evidence was sufficient to support the judgment, the appellant must make a motion for judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50(b). *Patel v. Penman*, 103 F.3d 868, 878 (9th Cir. 1996) ("failure to comply with Rule 50(b) precludes a challenge to the sufficiency of the evidence on appeal.").

[8] In order to determine whether or not the judgment award is excessive, the trial court must have first had a chance to review the question. *See Hahn v. Becker*, 588 F.2d 768, 771 (7th Cir. 1979) ("Absent a timely motion for a new trial and the trial court's ruling thereon this court may not review the alleged excessiveness of the verdicts"); *Baker v. Dillon*, 389 F.2d 57, 58 (5th Cir. 1968) ("Since there was no motion for a new trial in this case, we have no basis for reviewing the trial court's exercise of discretion and therefore no basis for reviewing the adequacy of damages.").

In addition, the failure to move for a mistrial upon an allegation of attorney misconduct weighs heavily against our review of Henson's claim that alleged misconduct by RTC counsel required the district court to hold an evidentiary hearing. *See Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266, 1276-77 (5th Cir. 1989) (failure to request a mistrial on claim of attorney misconduct before the jury deliberations showed that the appellants "gambled" on the jury verdict, and weighed against granting a new trial). "To grant a new trial because of attorney misconduct, 'the flavor of the misconduct must [have] sufficiently permeate[d] [the] entire proceeding to provide conviction that the jury was influenced by passion and prejudice in reaching its verdict.'" *Larez v. City of Los Angeles*, 946 F.2d 630, 637 (9th Cir. 1991) (citation omitted). Henson has presented no evidence that the alleged misconduct affected the proceedings, nor even that the inappropriate comments allegedly made by RTC counsel were heard by the jury.

We therefore conclude that Henson's challenges to the judgment necessarily fail.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

RELIGIOUS TECHNOLOGY CENTER,
a California non-profit corporation
Plaintiff,

v.

H. KEITH HENSON,
Defendant.

Filed April 15, 1997

Clerk U.S. District Court
Central District of California

Case No. C-96-20271-RMW

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO COPYRIGHT CLAIMS FOR RELIEF

Plaintiff Religious Technology Center's ("RTC's") motion for summary judgment pursuant to Federal Rule of Civil Procedure 56 was heard and submitted on April 11, 1997. The court has read the moving and responding papers and heard the argument of the parties. For the reasons set forth below, the court grants plaintiff's motion in part and denies it in part.

III. BACKGROUND

RTC brought suit for copyright infringement and trade secret violations against defendant H. Keith Henson after he allegedly posted and then reposted RTC's unpublished copyrighted work New Era Dianetics for Operating Thetans ("NOTs") Series 34[1] to the Internet. In his answer, Henson denies that he infringed the copyright and asserts various affirmative defenses including failure to state a claim, fair use, copyright misuse, unclean hands, estoppel and violation of public policy.

Plaintiff moves this court to grant summary judgment in its favor on the copyright infringement claims. It seeks declaratory judgment, statutory damages, and injunctive relief with respect to those claims.

IV. LEGAL STANDARD

Summary judgment is proper only if the record shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A genuine issue of material fact exists only when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2510 (1986). Entry of summary judgment is mandated against a party if that party fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. *Celotex Corp v. Catrett*, 2548, 2552-53 (1986). The court

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[1]NOTs Series 34 is part of the collective work known as Advanced Technology, allegedly written by L. Ron Hubbard. Specifically, it is one of 55 individual works contained in the copyrighted NOTs series. *See* Declaration of Warren McShane in Support of Motion for Partial Summary Judgment as to Copyright Claims for Relief ("McShane Decl.") ¶ 7.

must view all evidence in a light most favorable to the nonmoving party. *Masson v. New Yorker Magazine, Inc.*, 111 S. Ct. 2419,2434-35 (1991). However, credibility determinations, weighing evidence and drawing inferences are jury functions, not those of a judge deciding a motion for summary judgment. *Liberty Lobby*, 106 S. Ct. at 2513.

To withstand a motion for summary judgment, the nonmoving party may not rest on the mere allegations or denial of the adverse party's pleading. Fed. R. Civ. P. 56(e). Rather, the nonmoving party must provide specific facts showing there is a genuine issue of material fact in dispute. *Id.*

V. ANALYSIS

To establish copyright infringement, plaintiff must demonstrate that (1) RTC owns a valid copyright and (2) Henson violated one or more of the exclusive rights set forth in 17 U.S.C. § 106, including the right to reproduce the copyrighted work, the right to prepare derivative works, the right to distribute copies to the public, and the right to publicly display the work. *See* 17 U.S.C. §§ 106(1)-(3), (5), 501(a); *Feist Publications, Inc. v. Rural Telephone Service Co.*, 111 S. Ct. 1282, 1296 (1991).

A. Ownership of a Valid Copyright

Proof of ownership of an existing, valid and registered copyright interest is a statutory prerequisite to filing an infringement action. 17 U.S.C. § 411. The certificate of registration "made before or within five years after first publication of the work . . . constitute[s] prima facie evidence of the validity of the copyright," including originality, compliance with statutory formalities, and copyrightability. 17 U.S.C. § 410(c); *see* 3 Melville B. Nimmer & David Nimmer, Nimmer on Copyright § 13.01[A] at 1-17 (1996). When registration is made more than five years after first publication, the evidentiary weight of the certificate of registration is within the court's discretion. 17 U.S.C. § 410(c). When the plaintiff is not the

author of a work, he must provide evidence of a chain of title from the registrant to him. 3 Nimmer § 12.11[C] at 12-174.

In support of its motion, RTC provides an exhibit containing comparisons of NOTs Series 34 and the "copy" allegedly posted by Henson to the Internet on March 30, 1996.[2] *See* McShane Decl. Ex. D. The exhibit consists of the written segment allegedly copied by Henson, the corresponding Hubbard original, a certificate of copyright registration, a certified photocopy of the masked work on file at the United States Copyright Office, and a full "unmasked" version of the photocopy.[3] *See Id.* Plaintiff also provides copies of assignment and licensing agreements showing the chain of title from L. Ron Hubbard, the apparent author of the works, to plaintiff. *See* McShane Decl. Exs. A, B.

Henson challenges the validity of the copyright on the grounds that there is no copyright notice on the original material, that plaintiff waited beyond the permitted five years to put such notice on the material, and that the material was copyrighted in Hubbard's name "when it was in fact produce[d] by other people such as David Mayo." *See* Response to Motion for Partial Summery [sic] Judgment as to Copyright Claims for Relief ("Opposition") at 4:16-22. As evidence, Henson states that he "[t]hese irregularities are backed up by affidavits filed in other cases which the defendant is expecting to be able to file shortly." *Id.* at 4:20-22. The exhibits attached to the affidavit filed by

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[2] Since RTC provides a comparison with the March 30, 1996 posting only, the court focuses on that posting in its analysis.

[3] Although NOTs Series 34 is registered as a component part of the NOTs Series, it is entitled to copyright protection as a separate work. *See* 37 C.F.R. § 202.3(b)(3)(i)(B) (where a series of unpublished works is registered as a single collection, the registration "extends to each copyrightable element in the collection").

Henson two days before the hearing, however, do not demonstrate that there is any irregularity in the copyright that covers NOTs Series 34. Additionally, it is not clear what Henson means by the "original material" on which RTC allegedly failed to provide copyright notice.

Henson also contends that the licensing agreement between Hubbard's estate and RTC has been "called into question, as the person who benefitted from it the most (Miscavige) was the same person who notarized the transactions." *See Id.* at 5:1-2. he claims that "European handwriting experts indicate that Miscavige as well signed these documents using Hubbard's name." *Id.* at 5:4-5. Henson provides no evidence to support his blanket statements. The court has reviewed the licensing agreement attached as Exhibit A to the McShane Declaration and has not found the signature of Miscavige or Hubbard on the document. Further, the document appears to be notarized by official notary publics who are not parties to the agreements or involved in this case.

Thus, the substantial evidence shows that there is no triable issue of material fact that RTC is the owner of a valid, existing copyright in the NOTs Series of which NOTs Series 34 is a component part.[4]

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[4] At the hearing on the motion, Henson indicated that Magistrate Judge Edward A. Infante has now allowed the deposition of David Miscavige to go forward on issues Henson claims raise doubts as to RTC's ownership of the NOTs Series copyright. If Henson discovers information during the deposition that affects the validity of this order, he may seek leave to file a motion for reconsideration based on newly discovered evidence.

B. Fair Use Defense

Henson admits that he copied NOTs Series 34[5] and posted it to the Internet on March 30, 1996 and again on March 31, 1996.[6] He also admits the he knew the material was copyrighted by "somebody." *See* Kobrin Decl. Ex. C., Henson Dep. at 44:12-15. He claims, however, that he was entitled to do so since it was fair use of the materials. Since Henson raises no other legitimate defense, the dispositive issue as to this motion is whether Henson's use of NOTs Series 34 falls within the fair use exception to the copyright law.[7]

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[5] Henson asserts, however, that he "does not . . . to this day [know] that the material is in fact NOTs Series 34." Opposition at 5:9-12. Specifically, he claims that he is "still trying to make arrangements to see the version RTC is claiming to own of NOTs Series 34." *Id.* at 5:12-13. Henson also claims erroneously, that he is "forbidden" by the court to inspect the NOTs Series 34 attached as Exhibit D to the McShane Declaration. *See Id.* at 5:14-15. A comparison of Henson's admitted postings with NOTs Series 34 shows that the text of two are identical.

[6] Henson posted NOTs Series 34 again on March 31, 1996 after mistakenly believing he failed to post it correctly on March 30, 1996. *See* Declaration of Helena K. Kobrin in Support of Motion for Partial Summary Judgment as to Copyright Claims for Relief ("Kobrin Decl.") Ex. C, Videotaped Deposition of H. Keith Henson ("Henson Dep.") at 41:26-42:6. Henson believes that the Church of Scientology canceled the first posting, although he has no facts to support this belief. *See Id.* at 42:8-44:8.

[7] Henson also claims that he is entitled to post the NOTs Series 34 since copyright infringement is permitted by Internet custom or "Netiquette." There is no legal authority which supports Henson's argument that "Netiquette" permits copyright infringement. Thus, this defense fails.

An author's exclusive rights to reproduce, distribute, and display a copyrighted work under § 106 are limited by the fair use defense, which is set forth in § 107 as follows:

> Notwithstanding the provisions of section 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies . . . or by any other means specified in that section, for purposes of such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.

The fair use doctrine "permits and requires courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designed to foster." *Campbell v. Acuff-Rose Music, Inc.*, 114 S. Ct. 1164, 1170 (1994) (citation omitted). Whether the fair use defense is available requires a case-by-case determination whether a particular use is fair, *Harper & Row Publishers v. Nation Enterprises*, 105 S. Ct. 2218,2225 (1985), and focuses on the four nonexclusive factors provided in § 107:

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The four statutory factors are not treated in isolation from one another. *Campbell*, 114 S. Ct. at 1170-71. Rather, "[a]ll are to be explored, and the results weighed together, in light of the purposes of copyright." *Id.* at 1171.

1. Purpose and Character of Use

The first factor looks to the purpose and character of the defendant's use. The inquiry may be guided by the examples given in the preamble to § 107, which includes such purposes as criticism, comment, news reporting, and teaching. *Id.* The main objective for this investigation is to see "whether the new work merely 'supersedes the objects' of the original creation [citations] or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is 'transformative.'" *Id.* (citations omitted). Although such transformative use is not absolutely necessary to find fair use, such works "lie at the heart of the fair use doctrine's guarantee of breathing space within the confines of copyright." *Id.* The more transformative the new work, the less significance the other factors will have against a finding of fair use. *Id.*

RTC does not dispute that Henson's use was noncommercial but argues that his posting of the work was "completely non-transformative." Henson contends that "each and every line was transformed by being marked with the >, acknowledging in Usenet site that the line is quoted from another source." This in itself does not make a use transformative.

Henson also argues that the purpose of his posting is to educate the public and that this purpose overrides copyright law. *See* Opposition at 10:8-9, 11:10-22. He explains that "the posting was done in order to aid the public interest by warning the public against an unobvious danger of harm, established by a previous court order."[8] *Id.* at 12:22-24. He claims that NOTs Series 34 is a

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[8] Henson is apparently referring the [sic] an order issued by Judge Gesell in *United States v. An Article Device "Hubbard Electrometer," et al.*, 333 F. Supp. 357 (D.D.C. 1971), which he claims "forbids Church of Scientology and all related organizations from claiming to heal using an

"criminal instruction manual for the illegal practice of medicine, and it violates a Court order which expressly forbids Scientology to claim to be healing by using the E-meter." *Id.* at 10-1-4. Henson suggests that where there is a matter of public safety involved, the concept of fair use should be extended. *Id.* at 13:4-6. The limited commentary in Henson's posting does not reveal that Henson does not sufficiently explain why he needed to post the entire text of NOTs Series 34 to educate the public.

The posting may be viewed, at best, as a criticism designed to stimulate discussion, as his stated reason set forth in his March 30, 1996 posting is to "discuss any parts of NOTS which amount to manuals for criminal activities." McShane Decl. Ex. D, Henson's Copy. Even when treated as a criticism, however, Henson adds little new expression to the work. Much of the commentary does not discuss the content of NOTs Series 34. Henson posts NOTs Series 34 in the context of an "Open Letter to Judge Whyte" which discusses the temporary restraining order issued in a related case. The posting also seeks more "NOTs materials, stolen or not, which describe[] the criminal activities" and states that he intends to post such NOTs since it is in the public interest. *Id.* The court finds that Henson's very limited commentary is only minimally transformative.

Another consideration in evaluating this factor is the propriety of the defendant's conduct. *See Nation*, 105 S. Ct. at 2231-32 (citing 3 Nimmer § 13.05[A] at 13-72). "Fair use presupposes 'good faith' and 'fair dealing.'" *Id.* at 2232 (citations omitted). Here, Henson does not attempt to argue that the copying was unintentional or inadvertent. He has admitted that he knew the material was copyrighted but felt that discussions such

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(continued from previous page)
'E-meter.'" Henson has not shown how this ruling defeats plaintiff's motion in the present action. *See* Order Granting Plaintiff's Motion to Dismiss Counterclaims; Denying Defendant's Motions for Summary or Declaratory Judgment on Criminality of NOTs 34 and Whether it Violates Court Order, etc., dated August 5, 1996.

as his "are in the public interest, which override[] commercial copyright considerations." McShane Decl., Ex. D, Henson's Copy. The Supreme Court rejected a similar argument in *Nation*, recognizing that "[t]he fair use doctrine is not a license for corporate theft, empowering a court to ignore a copyright whenever it determines the underlying work contains material of possible public importance." *Nation*, 105 S. Ct. at 2229 (citing *Iowa State Univ. Research Found., Inc. v. Am. Broadcasting Cos., Inc.*, 621 F.2d 57, 61 (2d Cir. 1980)).

Despite Henson's noncommercial use, the court finds that this first factor weighs in RTC's favor since Henson's use is only minimally transformative and does not appear to be in good faith.[9]

2. Nature of Copyrighted Work

The second factor focuses on whether the copyrighted work is published or unpublished and whether it is informational or creative.

a) Published and Unpublished Works

The fact that a work is unpublished is a critical element of its "nature." *Id.* at 2232 (citing 3 Nimmer § 13.05[A]). The scope of fair use is narrower with respect to unpublished works, *see Id.*, and the amount of permissible copying will be less in the case of an unpublished work. *See* H.R. Rep. No. 102-286, 102d Cong., 2d Sess. 8 (1992); *see also* 3 Nimmer § 13.05[A][2][b] at 13-178-184. Here, the work at issue is unpublished.

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[9] The court recognizes that it has found that a question of fact exists as to whether Henson's posting constitutes willful infringement. Even if Henson believed in good faith that he could infringe for the public good, the first factor would still weigh in RTC's favor, as Henson's posting was only minimally transformative.

b) Informational or Creative Works

The scope of the fair use doctrine is broader with respect to factual works than creative or literary works. Courts dealing with this issue have recognized that Hubbard's works are difficult to classify and have differed in their conclusions of into which categories the works fall. *See New Era Publications Int'l, ApS v. Carol Publishing Group*, 904 F.2d 152, 158 (2d Cir. 1990) ("reasonable people can disagree over how to classify Hubbard's work," but works are "more properly viewed as factual or informational"); *Religious Tech. Center v. Lerma*, 908 F. Supp. 1362, 1367 (E.D. Va. 1995) (Advanced Technology documents "intended to be informational rather than creative and, therefore, . . . a broader fair use approach is appropriate"); *Bridge Publications, Inc. v. Vien*, 827 F. Supp. 629, 636 (S.D. Cal. 1993) (evidence showed that Hubbard's works are "product of his creative thought process, and not merely informational"). The work at issue here sets forth a step-by-step sequence for handling a physical condition. It is part of the NOTs Series, which is one of the gradient counseling levels delivered by the Church of Scientology. Thus, the court finds that since NOTs Series 34 may be considered a type of guideline to follow, the work appears to be more informational than creative.

This court has struggled with this issue before and remains unconvinced that this factor should play a major role in the context or religious works, which do not easily fit into the creative/informational dichotomy. *See Religious Tech. Center v. Netcom On-Line Com.*, 923 F. Supp. 1231, 1246 (N.D. Cal. 1995). However, because NOTs Series 34 is unpublished and its text was copied in its entirety, the court finds that this factor weighs heavily against Henson, despite the work's informational nature.

3. Amount or Substantiality of Copying

The third factor relates to the "amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107. Analysis of this factor includes examining what

percentage of the original work was copied and whether that portion constitutes the "heart" of the copyrighted work. *Nation*, 105 S. Ct. at 2233. Copying an entire work ordinarily militates against finding of fair use, although it is not an absolute rule. *See Sony Corp. v. Universal City Studios*, 104 S. Ct. 774, 792 (1984). Generally, no more of a work may be taken than is necessary to make the accompanying comment understandable. *Supermarket of Homes, Inc. v. San Fernando Valley Bd.*, 786 F.2d 1400, 1409 (9th Cir. 1986). Finally, "whatever the use, generally, it may not constitute a fair use if the entire work is reproduced." 3 Nimmer § 13.05[A][3] at 13-185.

Henson claims that he only copied 1.4 percent of the complete NOTs series, which is the "unit" registered with the Copyright Office. RTC contends that Henson copied the entire NOTs Series 34 since each component of the NOTs Series is separate, discrete and finite, with an individual heading and closing, a start and a finish. *See* McShane Decl. ¶ 7. Where a series of unpublished works is registered as a collective work, the registration extends to each copyrightable element in the collection. *See* 37 C.F.R. § 202.3(b)(3)(i)(B). Thus, the "work" analyzed for the purposes of the third fair use factor of "amount taken" is the individual work, not the collective work. *See Am. Geophys, Union v. Texaco, Inc.*, 802 F. Supp. 1, 17, (S.D.N.Y. 1992) *aff'd*, 60 F.3d 913 (2d Cir. 1994) (for purposes of fair use analysis, "copyrighted work" is individual periodical article, even though copyright covered entire issue). Because Henson copied NOTs Series 34 in its entirety, this factor weighs heavily in RTC's favor, especially since the work is unpublished.

4. Effect on Potential Market of Value of Work

The final factor involves "the extent of market harm caused by the particular actions of the alleged infringer" and "'whether unrestricted and widespread conduct of the sort engaged in by the defendant . . . would result in a substantially adverse impact on the potential market' for the original." *Campbell*, 114 S. Ct. at

1177 (quoting 3 Nimmer § 13.05[A][4] at 13-102.61). Although this factor is often seen as the most important criterion of fair use it "must almost always be judged in conjunction with the other three criteria." *Marcus v. Rowley*, 695 F.2d 1171, 1177 (9th Cir. 1983) (citation omitted). The fourth factor "militates against a finding of a fair use if there is a 'showing by a preponderance of the evidence that some meaningful likelihood of future harm exists.'" *Los Angeles News Service v. Tullo*, 973 F.2d 791, 798 (9th Cir. 1992).

Plaintiff claims that Henson's copying activities have the potential to diminish or prejudice the value of the unpublished copyrighted works in question. It claims that plaintiff and its affiliated entities have been faced with a "number of ex-parishioners using copyrighted materials to set up and market 'religious' training adapted from the Scientology religion." Motion for Summary Judgment as to Copyright Claims for Relief at 12:24-25. RTC further argues that if Henson is allowed to continue to infringe, "the potential for widespread adverse impact to RTC will be exacerbated exponentially, given the number of potential and threatened infringers and the ease with which they can disseminate RTC's confidential copyrighted works at the strike of a computer key." *Id.* at 22:1-4.

Although plaintiff offers no evidence in support of these assertions, Henson does not dispute this point. He concedes that the discussion and availability of the NOTs Series on the Internet may have adversely affected the value or marketability of the work since "*not* because people will take the material from the internet [sic] and use it, but because they will avoid i[t] for reasons internal to the work itself." Opposition at 13:19-21. He claims that the "unauthorized circulation will convince the public not to buy the product because it is rubbish." *Id.* at 13:22-24. Henson then claims that he did not post the work to "decrease sales for selfish or malicious reasons" and again argues that he acted for the protection of the public. *Id.* at 13:11-12.

Although Henson does not dispute and even agrees that his use may diminish the potential market, the court is not convinced that Henson's posting of the NOTs Series 34 will result in decreased marketability of the work. RTC has not presented sufficient evidence to show that a competitor of Scientology could use this single NOTs Series 34 to set up similar religious training programs. Further, NOTs Series 34 is a just one work in the collective NOTs Series, which in turn is one gradient counseling level that must be completed before the next is started. Thus, the value to a potential competitor or parishioner possessing NOTs Series 34 alone is not great. Thus, the court finds this factor weighs slightly in Henson's favor.

5. Equitable Balancing

The court finds that the evidence presented sufficiently shows that the copying of the unpublished NOTs Series 34 in its entirety combined with the minimal commentary negates a finding of fair use on summary judgment. Even though the fourth factor weighs slightly in Henson's favor, plaintiff's strong showing with respect to the other factors requires a finding of no fair use as a matter of law.

6. Conclusion

On his statutory fair use defense, Henson is the nonmoving party who "will bear the ultimate burden of persuasion at trial." *See Celotex*, 106 S. Ct. at 2254. Accordingly, RTC's burden as to fair use "may be discharged by pointing out that there is an absence of evidence to support the nonmoving party's case." *Id.* Then, the burden shifts to Henson to set forth sufficient facts showing that there is a genuine issue of material fact for trial. Since Henson has not done so, summary judgment is appropriate as to RTC's copyright claims.

C. Permanent Injunction

As a general rule, a permanent injunction will be granted when copyright infringement liability has been established and there is a threat of continuing violations. *MAI Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511, 520 (9th Cir. 1993) (upholding permanent injunction where threat of violation was clear). Section 502(a) authorizes the court to "grant temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." RTC urges the court to grant permanent injunctive relief as to the entire NOTs Series in light of Henson's history of infringement and threats.

Here, Henson posted NOTs Series 34 with the knowledge that it was copyrighted. Further, Henson has solicited and threatened to post other Advanced Technology works in an attempt to reveal the alleged criminal nature of the postings. Thus, it is not unlikely that he will attempt to infringe RTC's copyrights in the future. Accordingly, permanent injunctive relief is granted as to the entire copyrighted NOTs Series. *See Broadcast Music, Inc. v. United States Shoe Corp.*, 211 U.S.P.Q. 43, 45 (C.D. Cal. 1980), *aff'd*, 678 F.2d 816 (9th Cir. 1982) (where defendants had seven of BMI's copyrights, defendant permanently enjoined from performing "any musical composition which appears in the BMI repertoire"); *Walt Disney Co. v. Powell*, 897 F.2d 565, 568 (D.C. Cir. 1990) (where there was history of infringement and a significant threat of infringement remained, defendant also permanently enjoined from further infringement of plaintiff's cartoon characters not an issue in litigation); *Central Point Software, Inc. v. Nugent*, 903 F. Supp. 1057, 1060 (E.D. Tex. 1995) (where there was continuing threat of infringement, defendant enjoined from "interfering with any of the plaintiff's copyrights, including but not limited to, unauthorized use, copying, and/or distribution of plaintiff's copyrighted software, and from encouraging and aiding others to commit such acts").

Plaintiff is to submit a proposed permanent injunction to the court within twenty (20) days of this order. The proposed order

shall make clear that the injunction does not prevent the fair use of the works, as set forth in 17 U.S.C. § 107.

D. Statutory Damages

In addition to a permanent injunction, RTC seeks enhanced statutory damages of $100,000 for Henson's allegedly willful and knowing infringement of its copyright in NOTs Series 34.

Section 504(c)(1) provides that the copyright owner may elect to recover, instead of actual damages and profits, an award of statutory damages "in a sum not less than $500 or more than $20,000 as the court considers just" for each infringement. In cases of willful infringement where the copyright owner sustains the burden of proving, and the court finds, that infringement was done willfully, the court in its discretion may increase the award of statutory damages to a maximum of $100,000. *See* 17 U.S.C. § 504(c)(2). The Ninth Circuit has affirmed an award of such damages at the summary judgment stage. *See Peer Int'l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 (9th Cir. 1990).

An infringement is willful if the infringer knows that its conduct is an infringement or if the infringer has acted in reckless disregard of the copyright owner's right. *Video View, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1020 (7th Cir. 1991). Whether a defendant's acts are willful is an issue fact that requires an assessment of the defendant's intent. *Id.* Willful is defined as "knowledge that the defendant['s] conduct constituted an act of infringement." *Peer Int'l Corp.*, 909 F.2d at 1335.

Here, Henson knew the work was copyrighted "by somebody" when he posted NOTs Series 34. He also posted the work believing that such discussion would "override[] commercial copyright considerations." *See* McShane Decl. Ex. D, Henson's Copy. Moreover, Henson admits that he was "inspired" to "look at" and "reproduce" NOTs Series 34 after reading the temporary restraining order issued by this court against Grady Ward, a defendant in a related case, which enjoined Ward from doing the same. *See Id.* Based on this and other evidence

presented, Henson's infringement may have been willful. However, it appears that one who has been notified that certain conduct would constitute infringement, but who reasonably and in good faith believes the contrary, is not liable for willful infringement for his infringing conduct. *See* 3 Nimmer § 14.04[B][3] at 14-60-61. Therefore, the court finds that a question of fact exists as to willfulness.

E. Attorneys' Fees

RTC also seeks an award of its costs and attorneys' fees to compensate it for the great expense which it claims Henson deliberately caused RTC to incur.

In considering motions for attorneys' fees under § 505, the district could should "seek to promote the Copyright Act's objectives." *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1432 (9th Cir. 1996). Relying on *Fogerty v. Fantasy*, 114 S. Ct. 1023, 1033 n.19 (1994), the Ninth Circuit has enumerated several factors which the district court should consider in exercising its discretion to award fees, including "the degree of success obtained; frivolousness; motivation; objective unreasonableness and the need in particular circumstances to advance considerations of compensation and deterrence." *Id.* (citations omitted).

Although an award of attorneys' fees may be appropriate at a later date, the court feels that an award at this time is premature. The motion for attorneys' fees is denied without prejudice.

F. Impoundment

The court orders Henson to delete all copies of NOTs Series 34 and any of the other copyrighted NOTs Series from any computer hard drives in his possession within five (5) days of final judgment in this matter. Within that time, he is further ordered to turn over to the Clerk of the Court for impoundment all floppy disks and all hard copies of NOTs Series 34 and any of the other copyrighted NOTs Series in his possession. The impounded

copies shall remain with the Clerk of the Court pending a further order by this court.

VI. ORDER

For the foregoing reasons, the court grants RTC's motion for summary judgment on its copyright infringement claims. It denies the motion as to RTC's request for statutory damages and attorneys' fees.

DATED: 4/14/96

s/ Ronald M. Whyte

RONALD M. WHYTE
United States District Judge

APPENDIX C

**Internet Message Posted By Petitioner,
March 30, 1996
(From Respondent RTC's Excerpts of Record.
Appeal No. 98-16146, Vol. II, at 511-15)**

From netcom.com!hkhenson Sat Mar 30 08:55:14 1996
Xref: netcom.com alt.religion.scientology:161175
Newsgroups: alt.religion.scientology
Path: netcom.com!hkhenson
From: hkhenson@netcom.com (Keith Henson)
Subject: Re: SCAMIZDAT
Message-ID: <hkhensonDp2t5E.Eqn@netcom.com>
Organization: NETCOM On-line Communication Services (408 261-4700 guest)
X-Newsreader: TIN [version 1.2 PL1]
References: <hkkDoyJAt.6ro@netcom.com> <4jhnpo$j22@nyx.cs.du.edu>
Date: Sat, 30 Mar 1996 10:29:38 GMT
Lines: 253
Sender: hkhenson@netcom.netcom.com

tritium (anon47fa@nyx.cs.du.edu) wrote:
: In article <hkkDoyJAt.6ro@netcom.com>, Helena
: Kobrin <hkk@netcom.com> wrote:
: >
: > NOTICE TO READERS:

: > On March 6, 1996, Grady Ward posted a message
: > to the Internet Soliciting a NOTs pack. In a later posting,
: > Ward indicated his intention for SCAMIZDAT to post the
: > contents of that pack to this and the other newsgroups this
: > message has been cross-posted to. SCAMIZDAT had made
: > similar threats. The materials known as new Era Dianetics
: > for Operating Thetans, or "NOTS" are confidential,
: > unpublished works, protected by both copyright and trade
: > secret law.

: the purpose of this posting is to inform you that on March 29,
: 1996 at approximately 11:04 a.m., Judge Whyte specifically
: stated in court that persons other than Grady Ward and those
: acting in concert with him (etc.) are not restricted by his order
: from legally soliciting NOTS.

: helena kobrin is trying to intimidate random netizens without
: basis, and is possibly barratrous in her actions.

[Shelly Thomson posted most of this last night. After talking to the court today, I feel safe in posting this letter. I am also publicly seeking more NOTs material, stolen or not, which describes criminal activities. It is my intent to POST and discuss any parts of NOTs which amount to manuals for criminal activities. Such discussions are in the public interest, which overrides commercial copyright considerations.
Keith Henson]

H. Keith Henson
San Jose, CA

Ronald M. Whyte, Federal Judge
Northern District of California
San Jose, CA

Open Letter to Judge Whyte

Dear Judge Whyte:

In the company of perhaps 100,000 other people (the readers of the Usenet newsgroups alt.religion.scientology, alt. activism, alt.2600,comp.org.eff.talk, and misc.legal), I read the TRO against Mr. Grady Ward and "all persons in active concert." Was it your intent for this order to apply to random persons on the Internet such as myself? If so, I believe the TRO is a violation of my First Amendment rights to discuss the criminal activities of the cult of Scientology.

Upon reading the TRO you approved, I sorted the list of documents attached and ran a text search on the news spool on one of my accounts to see if any of these documents were there. Some were -- though it is impossible to tell if they are the real thing or not. I pulled out the first one which came up. I had not been inclined to look at this material before (it's *boring*), but your TRO inspired me. Assuming this is real, I can see why the "Church" of Scientology is trying to suppress this material. If carried out, the instructions in this particular bulletin amount to *criminal* acts, to wit, the practice of medicine without a license. I reproduce this widely available document in its entirety for your edification.

> HUBBARD COMMUNICATIONS OFFICE
> Saint Hill Manor, East Grinstead, Sussex
>
> HCO BULLETIN OF 14 NOVEMBER 1978
>
> NED for OTs Series 34
>
> THE SEQUENCE FOR HANDLING A PHYSICAL CONDITION
>
> *[TEXT OF DOCUMENT OMITTED]*
>
> L. RON HUBBARD
> FOUNDER

Please note that point 4 states that this process of "blowing BTs" cures illness. The phrases "cease to read" and "no longer read" refer to "auditing" with an E-meter. The "Church" of Scientology is under Court orders stemming from FDA actions in the early 1970s against making such claims involving the use of E-meters. This bulletin (assuming it is real) is written evidence of the level

of contempt the "Church" of Scientology has for the Courts. Scientology even has policies on using the court system to abuse critics and former members.

Forbidding discussion of this particular document, including quoting it entirely, is clearly against the public interest as well as a violation of my First Amendment rights. Unless, of course, copyright law can be used to prevent disclosure of instructions for criminal activity.

With respect to "all persons in active concert," I have certainly been sympathetic to the ideals Mr. Ward espouses, and felt much of the rage he must have felt when (as he puts it) the "criminal cult of Scientology" sent Gene Ingram, a wanted felon, to obtain pictures of Mr. Ward's children from his mother by deceit. For what reason did the "Church" of Scientology need pictures of Mr. Ward's children? Were they planning a kidnapping or was this just a tactic of intimidation? This would certainly be an interesting question for you to skillfully ask of the members of the law firm which paid Mr. Ingram for this particular service. They will be in your court Friday.

I know that taking a stand against Scientology is likely to subject me and my family to the same abuse Mr. Ward has experienced. But there comes a point where people of good will *must* stand up to criminals--even to those who are experts in using the courts to harass. If you think I am being too harsh in this matter, I can supply you with nearly unlimited affidavits and court findings which show a consistent pattern of criminal behavior for this cult over decades of time. Friday I will provide to you a letter from Mr. Arnie Lerma to Judge Brinkma [sic] about the stunts pulled on Mr. Lerma in a related case.

Many of those who read these news groups are outside of the US, and thus not subject to your authority. I, however, am local to San Jose and will be in your court Friday morning. It is my position that the public interest in this matter should override *all commercial* copyright concerns. The entire corpus of material the "Church" of Scientology is trying to keep from public view is

so at odds with what cult victims' are told when they are suckered into it as to constitute fraud--thinly disguised as "religion." On the other hand, if you feel the TRO *does* preclude quoting examples of the copyrighted, trade secret, criminal instruction manuals of the "Church" of Scientology, please let me know.

Sincerely,

H. Keith Henson

APPENDIX D

Lead editorial of the WALL STREET JOURNAL, July 21, 1998 (page A14)

Internet Czar?

Which judge is going to run the Internet? Stanley Sporkin made a stab early on in the Microsoft antitrust case, before an appeals panel removed him. Thomas Penfield Jackson has now assumed that gavel, but so far has had important decisions twice shot down on appeal. With would-be Beltway czars faltering, maybe we should glance toward Silicon Valley, covered by the U.S. District Court in San Jose. There you will meet Judge Ronald Whyte.

Last October Judge Whyte was assigned a case with the pregnant title of *Sun Microsystems Inc. v. Microsoft Corp.* In contrast with Justice Department fantasies about browser predation, Sun's case has a certain basic plausibility. It alleges that Microsoft abused its licenses fooling around with Sun's Java scripting language; Java is intended to work interchangeably on different operating systems, but Microsoft came up with a mutant that works better on Microsoft's Windows. While "merely" a contract case, the outcome may determine Internet language standards, and even more importantly, the rules of cross-licensing on which computer technology ultimately depends.

So putative Czar Whyte's jurisprudence is of some real consequence. As it happens, he already busily if quietly has been establishing cyberlaw, handling a succession of cases concerning the Internet and the crucial question of copyright. The cases arise from the efforts of the church of Scientology to keep its secret but copyrighted scriptures from being put on the Internet by defected members and their newfound cyberfriends.

In 1996, the Church of Scientology sued Tom Klemesrud, the systems operator of a bulletin board, and Netcom, his Internet service provider, for copyright infringement. Both cases eventually were settled. Mr. Klemesrud agreed to pay the church $50,000 to go away, but admitted no liability. Netcom agreed to

establish new protocol for handling disputes in which copyright holders claimed infringement, but were unwilling to display the originals for comparison with posted material.

Some similarly situated individuals, however, are still in Judge Whyte's court. Portions of secret Scientology texts have been popping up anonymously in many Internet discussion groups for some years, and in 1994 ex-Scientologist Dennis Erlich attached his name to one of the postings and promptly was sued by his former brethren for copyright infringement and misappropriating trade secrets. Eighteen months later, Grady Ward, a virulent critic of the church, also was sued in connection with the posted texts. Both suits are pending in Judge Whyte's court.

In 1996, Keith Henson, an electrical engineer, found himself before Judge Whyte; he'd posted church script on the Internet in anger over the discovery that Scientologists were trying to muzzle cybercritics by erasing internet discussion groups. Mr. Henson bravely but no doubt unwisely chose to represent himself in court. Judge Whyte ruled on infringement as a matter of law, and found Mr. Henson guilty without a jury trial. The judge then convened a jury on the question of damages and the Scientologists won $75,000, which their lawyers believe to be the largest copyright infringement statutory damage award ever recorded for a single infringement.

In addition, Mr. Henson faces a possible jail sentence for contempt of court. He also posted a transcript of his own trial that included the sacrosanct material. Mr. Henson said he did not know the computer diskette he received included the material, but Judge Whyte found him in contempt, and reserved judgment on the penalty. He has, however enjoined the defendant from publishing a register of other web sites where Scientology scripture can already be found. Mr. Henson has finally retained counsel from a lawyer who has opposed the Scientologists in other cases, and plans to appeal the decisions.

The Scientologists are merely doing their thing, but both cyberlitigants and First Amendment vigilantes ought to take a close look at Judge Whyte's reasoning. Mr. Henson is not trying to steal the profits from Scientology scriptures; his motive is to criticize what he believes is a corrupt and dangerous organization that practices coercive mind control and engages in medical quackery, in the process bilking vulnerable individuals for thousands of dollars and endangering their health. While admitting that the documents were copyrighted, he felt his postings would be covered under as "fair comment and criticism," a long-standing provision of copyright law.

This, Judge Whyte held, didn't even require a jury to deliberate on Mr. Henson's motives. For one thing, his postings didn't include enough explicit criticism of the material, since he felt it was preposterous on its face. More basically, the judge found, the "fair use" doctrine in its application is much stronger for already published material, and of course the posted scriptures had not been published by the owners of the copyright. You can criticize the texts of a public religion, that is, but a secret religion is immune.

Judge Whyte, in short, has turned copyright law on its head. The purpose of the law is to encourage free speech, giving authors and artists comfort in knowing that others cannot misappropriate their works for their own profit. The essence of the matter before him, as anyone not blinded by a Pecksniffian literalness can see, is that the plaintiffs are using the law to muzzle their critics. In addition, the judge is in the process of morphing an already dubious tort case into a criminal matter through the contempt power—a threat to freedom of speech well recognized in the First Amendment community.

Now, we have a certain sympathy for Judge Whyte, rooted in the feeling that the internet copyright issue is too important to be fought out over secret scriptures and *pro se* defendants. Maybe Judge Whyte could figure out how to send all such cases across the country to Judge Sporkin. All the same, the third would-be

Czar is off on no better foot than the first two—a bad omen for *Sun v. Microsoft*, for internet law and for free speech.